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No. 86-1026

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

IRWIN A. SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

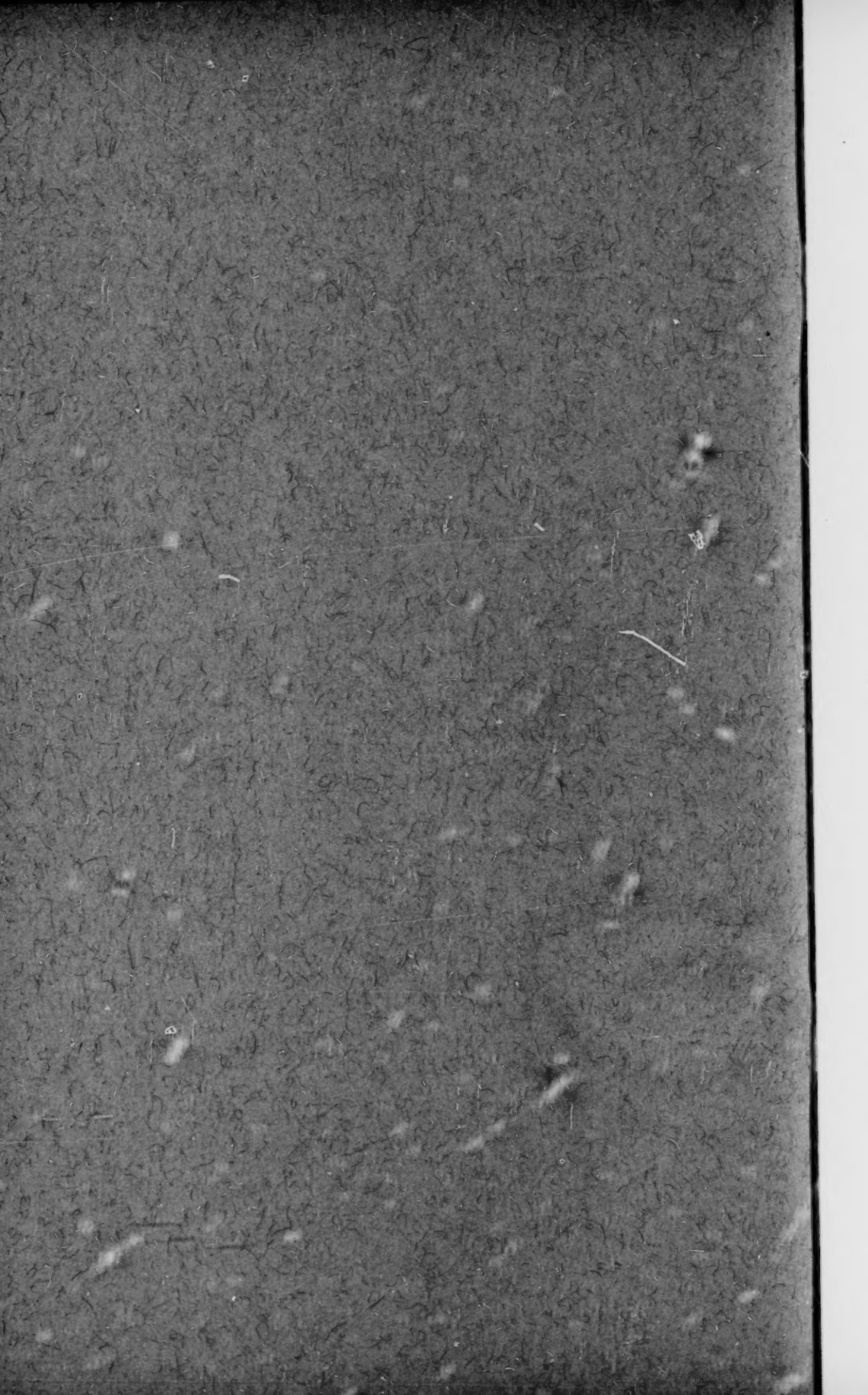
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QUESTIONS PRESENTED

1. Whether the trial court's instructions incorrectly indicated to the jury that they could convict a defendant of tax evasion even if he held a good faith belief that he did not have to pay taxes.

2. Whether the trial court's instructions incorrectly indicated to the jury that they could convict a defendant of tax evasion simply for failing to file a return and pay a tax.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1b-27b) is reported at 801 F.2d 108.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1986. A petition for rehearing was denied on October 22, 1986 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on three counts of attempted evasion of personal income taxes, in violation of 26 U.S.C. 7201, and on one count of failure to file a corporate income tax return, in

violation of 26 U.S.C. 7203. He was sentenced to six years' imprisonment, followed by three years' probation, and was ordered to pay fines totalling \$30,000. The court of appeals affirmed (Pet. App. 1b-27b).

a. Petitioner is an author, lecturer, and self-proclaimed expert on taxes and the United States Constitution. At trial, the government established that petitioner failed to file federal income tax returns for the calendar years 1980, 1981, and 1982. The proof also showed that he did not pay any income taxes for those years and that his corporation, Irwin A. Schiff, Inc., failed to file a tax return for its fiscal year ending 1981. Petitioner did not dispute that he did not file federal income tax returns or pay income taxes for the prosecution years. Pet. App. 3b-4b.

The government also presented evidence to establish that petitioner engaged in transactions with financial institutions in Switzerland and the Cayman Islands. The precise nature of the transactions could not be determined because of the bank secrecy laws of those countries and because petitioner refused to disclose any information concerning his sources of income (Pet. App. 5b; Tr. 1899-1901, 1905-1906, 2034-2036). Furthermore, petitioner's transactions with the financial institution in the Cayman Islands were conducted through the use of a numbered account, which prevented the Internal Revenue Service from obtaining the records of that account (Tr. 2056-2057).

Petitioner and his employees used pens with non-reproducible ink in an attempt to prevent the Internal Revenue Service from photocopying petitioner's financial records (Pet. App. 5b; Tr. 718-728, 1108-1110). The use of non-reproducible ink hampered the Internal Revenue Service in its efforts to determine petitioner's taxable income (Tr. 2032).

Petitioner advised those who attended his seminars that they could not be convicted of income tax evasion as long as they did not file any income tax returns (Tr. 472-473). He also advised others to thwart the Internal Revenue Service in its tax collection efforts by lying, cancelling appointments, and using incorrect social security numbers (Tr. 476; GXs 33-1, 33-2). In addition, petitioner filed a "Declaration of Trust" and quitclaim deed pursuant to which he transferred to his children title to real property. Actions of that nature tend to cloud title to the property and to impede the Internal Revenue Service in its collection of taxes. Petitioner filed a similar declaration of trust with the Simon and Schuster Publishing Company for the royalties from his book, *How Anyone Can Stop Paying Income Taxes*. Tr. 855-858, 1241-1251, 1686-1703; GXs 35-1, 36-4.

b. Petitioner did not testify at trial. His defense was that he did not "willfully" evade taxes, because his failure to pay was based on a good faith misunderstanding of the tax law. Petitioner's defense was supported by testimony that he relied on the advice of counsel in failing to pay his taxes. Pet. App. 6b-7b.

The district court instructed the jury that the government had to prove that petitioner knowingly and willfully violated the law and that petitioner's conduct would not have been willful if he had acted in accordance with a good faith misunderstanding of the law (Pet. App. 24e-30e). Specifically, the court instructed that, if petitioner believed in good faith that his income was not taxable or if he had a good faith misunderstanding of the law, he did not have the criminal intent necessary for conviction (*id.* at 28e-29e). The court added, however, that a good faith misunderstanding of the law is different from a mere disagreement with the law (*id.* at 29e). In this connection, the court instructed the jury that "[i]n considering the Defendant's claim that in good faith he did not believe the law required him to file returns

or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief" (*id.* at 30e). Petitioner did not object to this portion of the instruction at any time during the trial (*id.* at 9b).¹

c. The court of appeals affirmed petitioner's convictions (Pet. App. 1b-27b). Petitioner argued on appeal that the portion of the district court's instruction referring to the basis for petitioner's belief constituted "plain error" because it improperly directed the jury to apply an objective test to determine the willfulness of his conduct, rather than a subjective test requiring the jurors to ascertain his actual beliefs and intent. The court of appeals rejected that characterization of the instruction. It held that the instruction did not impose an objective test, but rather directed the jury to determine whether petitioner actually held a good faith belief in the legality of his actions. *Id.* at 9b-12b.²

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 12-15) that the trial court's instructions were inconsistent with the requirement that the government prove that petitioner

¹Petitioner suggests (Pet. 11) that he did timely object to the portion of the charge at issue here. The objection cited by petitioner, however, is addressed to a different point—whether "willful blindness" by the defendant could defeat the good faith defense (see Pet. App. 54e-56e). The court of appeals found (*id.* at 9b) that petitioner failed to object to the relevant portion of the charge, and it treated the issue before it as whether the instruction constituted plain error.

²The court also stated that, even if the instruction had imposed an "objective reasonableness" test, it would not have been erroneous. The court stated that the evidence clearly established that petitioner was aware that his interpretation of the law had been rejected by two federal courts and he had been apprised in previous trials that his interpretation was incorrect; thus, he no longer could have had a good faith belief that his views as to the tax system were in fact the law. Pet. App. 12b-14b. The court concluded that "the good faith defense encompasses misunderstanding of the law, not disagreement with the law" (*id.* at 13b).

had a subjective intent to violate the law. The plain import of the court's instruction was that the jury was required to consider petitioner's actual beliefs, and the court did not instruct the jury that petitioner's beliefs had to be objectively reasonable in order to negate willfulness. The court's instruction to the jury to consider the "basis" asserted for petitioner's beliefs was calculated to direct the jury's inquiry to whether petitioner genuinely believed in good faith that he did not have to pay taxes or, rather, whether he was asserting such a belief as a smokescreen to camouflage willful tax evasion.³ As the court of appeals correctly noted (Pet. App. 10b), "[i]f the defendant's mere claim of good faith is not to be the end of the case, a trier of fact must evaluate the 'basis' for that claim in order to determine whether the claim is genuine."

The courts of appeals have unanimously upheld similar instructions permitting the jury to consider the basis of a defendant's asserted belief in considering whether the belief is held in good faith. Such an instruction, the courts have held, does not deviate from the subjective intent standard. See, e.g., *United States v. Payne*, 800 F.2d 227, 229 (10th Cir. 1986); *United States v. McCarty*, 665 F.2d 596, 597 & n.2 (5th Cir.), cert. denied, 456 U.S. 991 (1982); *Cooley v. United States*, 501 F.2d 1249, 1253 & n.4 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975). In particular, petitioner's assertion that the decision below conflicts with First Circuit precedent is without merit. In *United States v. Turano*, 802 F.2d 10 (1986), the First Circuit rejected a challenge to instructions that directed the jury to consider "on what [the

³This focus was made quite clear in the court's instructions (Pet. App. 29e): "The grounds on which Defendant bases his claims of good faith in a belief that his conduct was lawful may be considered in deciding whether he in fact acted in good faith, or whether he intended and willfully attempted to evade or defeat the tax."

defendant's position] was based" (*id.* at 11). The instructions in *Turano* were almost identical to those given in this case. The *Turano* court explained that the instruction as a whole "properly inform[ed] the jury how to apply a difficult subjective test" (*ibid.*). In sum, there is no basis for petitioner's assertion that his case would have been decided differently if it had arisen in another circuit, and there is no conflict in the circuits that requires resolution by this Court.⁴ The trial court did not err at all in instructing the jury on this point, much less commit plain error.

2. Petitioner contends (Pet. 15-18) that the court's supplemental instructions in response to a question submitted after the jury had begun its deliberations erroneously permitted the jury to convict him of tax evasion solely on the basis of his failure to file a return and to pay a tax.

a. The factual background of this issue is as follows. The first three counts of the indictment charged that petitioner received taxable income in amounts requiring him to file income tax returns and to pay income tax, but that petitioner "did willfully and knowingly attempt to evade and defeat the said income tax * * * by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income" (Pet. App. 1c-4c). During the course of its deliberations, the jury submitted a question

⁴The cases cited by petitioner as being in conflict with the decision below (see Pet. 12-14) are all inapposite because in each case where the instructions were held invalid the jury had been instructed that it could convict the defendant even if he held a good faith belief that his conduct was lawful, as long as that belief was objectively unreasonable. As noted in the text, each of the circuits represented in those cases—the First, Fifth, and Tenth—has upheld instructions similar to those given in this case.

to the court with respect to whether it had to find that the government proved the "concealing and attempting to conceal" element beyond a reasonable doubt. The trial court responded by first re-instructing the jury that the government must prove beyond a reasonable doubt the following: the existence of a substantial tax deficiency for each of the prosecution years; knowledge on the part of petitioner that the tax was due and owing; and a willful attempt, in some manner, to evade or defeat such tax (*id.* at 132e-133e). The court then stated (*id.* at 133e-136e):

In the indictment there are three ways in which the government has made the charge that there was a willful attempt in some manner to evade or defeat the tax. What you must be concerned with is whether the government has proven to your satisfaction beyond a reasonable doubt each of the three elements as I have charged them to you. Therefore, the answer to your question is not really either yes or no in the sense that if the evasion and the only act of evading that you find proven was by the concealing or attempting to conceal, then the answer to the question is, yes. But if you find that some other manner which is the third element of the proof necessary is something, and this again is for you to decide if it happens to be the case, is an act or omission other than concealment, but which nonetheless constitutes a willful attempt on the part of the defendant to evade or defeat the tax, then the answer to the question is, no.

In other words, the government must prove before the defendant may be convicted in any one of the three years, that the defendant willfully attempted in some manner to evade or defeat the tax with the specific intent to defraud the government of such tax.

* * * * *

The defendant is not merely charged with failure to file tax returns; he is charged with evasion, and thus he must be proven to have taken some action for the purpose of evading or defeating payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file. While failure to file may be an action of evasion, if evasion was his purpose, the government must prove an act or acts the purpose and intent of which was specifically to evade or defeat the payment of a tax which the law requires the defendant to pay.

b. At the outset, we note that this contention—that the challenged instruction suggested to the jury that evidence of petitioner's failure to file a return or his failure to pay income taxes would constitute a sufficient basis to convict for attempted tax evasion—is raised for the first time in this Court. Petitioner did not make this objection in the trial court, nor did he raise it in the court of appeals. Accordingly, the claim should not be considered. See, e.g., *Berke-mer v. McCarty*, 468 U.S. 420, 443 (1984); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).⁵

In any event, petitioner's contention is without merit. Because petitioner did not timely object to the charge on this ground, thereby giving the trial court the opportunity to rectify the alleged error, he has forfeited any claim of error unless it is "so 'plain' the trial judge and prosecutor

⁵Petitioner did argue on appeal the distinct claim that the court's response to the question permitted the jury to base its conviction on conduct not charged in the indictment and to reach a non-unanimous verdict on the basis of uncharged acts (see Pet. App. 17b-25b). The court of appeals correctly rejected these arguments, holding that the instruction directed the jury to consider only the methods of evasion alleged in the indictment and that the jury was adequately charged on the necessity of a unanimous verdict (*id.* at 20b-25b).

were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 162-163 (1982); see Rules 30 and 52(b), Fed. R. Crim. P. Any error in the court's instruction did not rise to this level. While the instruction was not a model of clarity, it sufficiently apprised the jury of the government's burden of proof, and it did not constitute plain error.

It is well established that, to obtain a felony conviction under Section 7201 for attempting to evade and defeat income tax, the government cannot rely solely on evidence proving the misdemeanors of failure to file a tax return and failure to pay income tax, but must also establish an affirmative act constituting evasion or attempted evasion. *Sansone v. United States*, 380 U.S. 343 (1965); *Spies v. United States*, 317 U.S. 492 (1943). The requisite affirmative attempt "may be inferred from such conduct as * * * concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." *Spies v. United States*, 317 U.S. at 499. The court's instructions, taken as a whole (see *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973)), adequately informed the jury of these requirements for conviction.

The court instructed the jury at several points in the charge that proof of failure to file an income tax return was not a sufficient basis to convict petitioner on charges of tax evasion (Pet. App. 25e, 26e, 64e, 65e). The court also charged the jury that the government was required to prove that petitioner took some affirmative action to evade or defeat the payment of income taxes (*id.* at 25e, 27e). And the court definitively told the jury that failure voluntarily to disclose taxable income was not synonymous with an attempt to conceal income (*id.* at 113e). These basic points were specifically reiterated by the court in the challenged

supplemental instructions in response to the jury's inquiry. The court stated that the defendant "must be proven to have taken some action for the purpose of evading or defeating payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file" (*id.* at 136e). In addition, the jurors were given a copy of the indictment, which correctly set forth the statutory requirements for conviction, to use in their deliberations, and they were instructed that all elements of the crime had to be proven beyond a reasonable doubt. Thus, the charge, viewed as a whole, was correct, and the supplemental instruction plainly did not constitute a "miscarriage of justice" (*United States v. Frady*, 456 U.S. at 163 n.14) that would warrant reversal.⁶

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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⁶Petitioner does not dispute that there was ample evidence that he had affirmatively concealed, or attempted to conceal, his taxable income (see Pet. App. 24b). See also pages 2-3, *supra*.

